No. 2014

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. W. JENKINS & COMPANY, a Corporation,

~~Appellant~~ Plaintiff in Error,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,

~~Appellee~~ Defendant in Error

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

FOR PLAINTIFF ~~AND APPELLANT~~ in Error:

CARROLL ALLEN, BERTIN A. WEYL, Esqs., 219 H. W. Hellman Building, Los Angeles, California.

FOR DEFENDANT ~~AND APPELLEE~~ in Error:

GRAY, BARKER & BOWEN, Esqs., Suite 1029 Title Insurance Building, Los Angeles, California.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Citation.

United States of America—ss.

To Anaheim Sugar Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States for the Ninth Circuit to be held at the city of San Francisco, state of California, on the 22 day of May, 1917, pursuant to an order allowing a writ of error filed and entered in the clerk's office of the District Court of the United States, in and for the Southern District of California, Southern Division, from a final judgment and decree signed, filed and entered on the 23 day of April, 1917, in that certain suit, being #355 Civil, wherein T. W. Jenkins & Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment and decree rendered against appellant as in said order allowing said writ of error mentioned should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Oscar A. Trippet, United States district judge for the Southern District of Cali-

fornia, Southern Division, this 23 day of April, 1917, and the Independence of the United States.

OSCAR A. TRIPPET,

United States District Judge for the Southern District of California, Southern Division.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Citation. Received copy of the within Apr. 23, 1917. Donald Barker, by J. E. K. Filed Apr. 24, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation.

Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,

Defendant.

Writ of Error.

United States of America—ss.

The President of the United States to the Honorable Benjamin F. Bledsoe, Judge of the United States District Court, in and for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the

rendition of the judgment and decree of a plea which is before said District Court between T. W. Jenkins & Company, a corporation, plaintiff in error, and Anaheim Sugar Company, a corporation, defendant in error, a manifest error hath happened to the great damage of said plaintiff, T. W. Jenkins & Company, a corporation, as by its complaint appears. We, being willing that error if any hath been shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Circuit Court of the United States for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty (30) days from the date hereof in the said Circuit Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States Supreme Court, this 23rd day of April, 1917.

(Seal) WM. M. VAN DYKE,
Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

Allowed by:
OSCAR A. TRIPPET,
Judge.

I hereby certify that a copy of the within writ of error was on the 23rd day of April, 1917, lodged in the clerk's office of said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Writ of error. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., Attorneys for plaintiff.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 355 Civil.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Second Amended Complaint—At Law Damages for Breach of Contract.

Now comes the plaintiff above named and, after leave of court first had and obtained therefor, files this its second amended complaint against Anaheim Sugar Company, a corporation, and for cause of action alleges:

I.

That at all times herein mentioned the plaintiff, T. W. Jenkins & Company, has been and now is a corporation organized and existing under and by virtue of the laws of the state of Oregon, and has had, and now has, its principal place of business in the city of Portland, in said state of Oregon, and has been, and now is, engaged in buying and selling and dealing in sugar and kindred articles. That at all the times herein mentioned the plaintiff has been, and now is, a citizen and resident of the state of Oregon aforesaid.

II.

That at all the times herein mentioned the defendant, Anaheim Sugar Company, has been, and now is, a corporation organized and existing under and by virtue of the laws of the state of California, and has had, and now has, its principal place of business at Anaheim, in the county of Orange, in the said state of California, and has been, and is now, engaged in the business of manufacturing and refining sugar. That at all the times herein mentioned the said defendant has been, and now is, a citizen and resident of the state of California, and has resided, and now resides, in the South-

ern District of the state of California, and in the Southern Division thereof.

III.

That on or about the 13th day of June, 1914, at the city of San Francisco, state of California, the plaintiff and defendant made and entered into an agreement in writing, in the words and figures as follows, to-wit:

(Contract subject to unforeseen acts of Providence, such as fire, earthquake, flood.)

San Francisco, Calif., June 13, 1914.

A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Company, party of second part.

To wit:

Party of first part sells and party of second part buys August requirements bags fine granulated beet sugar at $4.20 per bag less 2% cash 8 days, f. o. b. San Francisco, August shipment.

It being understood and agreed that party of the first part guarantees the price up to time of arrival against decline only to the basis of the C. & H. and Western Sugar Refining Co.

ANAHEIM SUGAR COMPANY,
Per Ariss, Campbell & Gault, Agts.,
Party of 1st Part.

T. W. JENKINS & COMPANY,
Party of 2nd Part.

IV.

That the price agreed upon between plaintiff and defendant, to-wit, four and 20/100 dollars ($4.20) per bag, was ten per cent (10%) less than the prevailing market price at San Francisco, the place where said

contract was entered into, and said price was fixed by defendant in consideration of the plaintiff agreeing with the defendant that it would purchase exclusively from defendant all fine granulated beet sugar required in its business during the month of August, 1914, and relying upon defendant's agreement to sell to plaintiff all fine granulated beet sugar required by it in its business during the said month of August, plaintiff made no other arrangement for the purchase of its August requirements and did not purchase any fine granulated beet sugar from any person or persons other than defendant above named.

V.

That thereafter during the month of August, 1914, plaintiff required in its business and ordered of defendant four thousand eight hundred (4800) bags of fine granulated beet sugar, and there was shipped and delivered from time to time during said month of August by defendant to plaintiff six hundred (600) bags of fine granulated beet sugar, and no more.

VI.

That the time for the delivery of the said sugar so ordered by plaintiff of defendant has elapsed; that plaintiff during the month of August required and demanded of defendant that it ship and deliver to plaintiff the additional four thousand two hundred (4200) bags of said sugar ordered by it during said month of August as aforesaid, but defendant did then and ever since has refused to ship or deliver said four thousand two hundred bags of said sugar, or any part thereof, and has not shipped or delivered the same, or any part thereof, to the plaintiff.

VII.

That plaintiff was at all times during the said month of August, and after its order to defendant to ship and deliver the said four thousand two hundred (4200) bags of said sugar, ready, willing, and able to accept the shipment and delivery of the whole thereof, and to pay for the same at the price and upon the terms aforesaid and according to said agreement.

VIII.

That at the time said contract was entered into plaintiff was, and had been for many years, engaged in the wholesale grocery business in the city of Portland, state of Oregon, and in the pursuit of and carrying on of said business it had in the states of Oregon, Washington and California, and other places, many thousands of customers to whom it sold goods, wares, merchandise and sugar. That much of plaintiff's business consisted in the dealing in and selling at wholesale to its said customers in said places sugar in bag lots. That said dealing in and sale of sugar was carried on by plaintiff in the following manner: That plaintiff would contract with a sugar producer or a sugar refiner for the sale to it, covering a specified period, of such sugar as it would require in its business and for its sale to said customers, and that plaintiff would thereupon receive from and solicit from its said customers orders for sugar in bag lots at a stipulated price, based on the contract price between plaintiff and said producer or refiner of said sugar, delivery to be made to its said customers at a future time agreed upon between the plaintiff and its said customers at the time of such sale, all of which said facts were well known to defendant

herein at the time said contract was entered into by and between plaintiff and defendant.

IX.

That plaintiff, in its said business, as hereinbefore set forth, usually and ordinarily required during the month of August of each year, and that it had required during the month of August for many years last past, sugar of the kind and character ordered from defendant in excess of four thousand eight hundred (4800) bags, and that relying upon said contract and the terms thereof, and upon said knowledge of defendant, plaintiff did solicit and receive from many of its customers orders for four thousand eight hundred (4800) bags of fine granulated beet sugar, which said sugar plaintiff intended to furnish and deliver to its said customers from the sugar to be ordered from and delivered by defendant, under the terms of said contract, to plaintiff herein. That plaintiff agreed with its said customers to furnish and deliver said sugar at the prices and at the times agreed upon between plaintiff and its customers, and that plaintiff therefore required in its said business and in the pursuit thereof, as hereinbefore set forth, during the month of August, 1914, the said four thousand eight hundred (4800) bags of sugar, and that at the time said contract was entered into the defendant knew, and ever since that time has known, the nature and character of plaintiff's business and the manner in which it was conducted, as hereinbefore set forth, and what plaintiff's requirements for sugar would be during the term of said contract entered into with plaintiff, and that relying upon said contract and upon said knowledge on the part of defendant, plaintiff did enter into

with its said customers the contracts for the delivery of sugar, hereinbefore referred to, and that by reason thereof it required in its said business during the month of August, 1914, the said four thousand eight hundred (4800) bags of sugar.

X.

That all of said four thousand eight hundred (4800) bags of sugar which plaintiff herein had contracted and agreed to furnish to its said customers were sold to its said customers for delivery to them during the month of August, 1914, and that orders therefor were taken by the plaintiff herein from its said customers during the months of July and August, 1914.

XI.

That by reason of the refusal of the defendant to deliver said four thousand two hundred (4200) bags of sugar and by reason of the non-delivery thereof, the plaintiff lost its profits on the re-sale thereof, and was compelled to and did buy in the open market, at the prevailing market price, fine granulated beet sugar at a price in excess of said contract price, amounting to three and 10/100 dollars ($3.10) per bag, and that it did purchase in the open market at said advanced price four thousand two hundred (4200) bags of said sugar for delivery to its said customers.

XII.

That by reason of the premises plaintiff has been damaged by defendant in the sum of thirteen thousand and twenty dollars ($13,020.00).

Wherefore, plaintiff demands judgment against the defendant, Anaheim Sugar Company, in the sum of thirteen thousand and twenty ($13,020.00), lawful

money of the United States of America, for its costs of suit, and for such other and further relief as may to the court seem meet and proper.

ALLEN & WEYL,
Attorneys for Plaintiff.

State of California. County of Los Angeles—ss.

Bertin A. Weyl, being duly sworn, deposes and says: That he is a member of the firm of Allen & Weyl, attorneys-at-law, and that he is one of the attorneys for the plaintiff in the above entitled action; that the plaintiff is a corporation and does not reside in the county and does not have its office or principal place of business in the county where its said attorneys reside; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information or belief, and as to those matters that he believes it to be true.

BERTIN A. WEYL.

Subscribed and sworn to before me this 3rd day of March, 1916.

(Seal) L. P. MAYO,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Second amended complaint—at law damages for breach of contract. Received copy of the within Mar. 3, 1916. Gray, Barker & Bowen, by J. E. K. Filed Mar. 4,

1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

In the United States District, Southern District of California, Southern Division.

File No. 355.

T. W. JENKINS,

Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,

Defendant.

Demurrer to Second Amended Complaint.

Comes now the defendant and demurs to the second amended complaint of the plaintiff upon the following grounds, to-wit:

I.

That said second amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said second amended complaint is uncertain in the following particulars, to-wit: In that it cannot be ascertained therefrom:

(a) What is meant by the term "August requirements bags" contained in the contract set out in paragraph III of the second amended complaint.

(b) Whether it is intended by plaintiff to allege that there was a contract between plaintiff and defendant other than said written agreement set out in the complaint, whereby plaintiff agreed with defendant that

he would purchase "exclusively from defendant all fine granulated beet sugar required in its business during the month of August, 1914," or whether by the allegations of paragraph IV of the second amended complaint plaintiff seeks to have said written contract interpreted to constitute such agreement.

(c) Whether plaintiff intends to allege that defendant agreed by an agreement other than said written contract to sell to plaintiff "all fine granulated beet sugar required by it in its business during the said month of August."

(d) Whether it is intended by the allegations of paragraph XI of the second amended complaint to allege that plaintiff purchased in the open market at an advanced price therein stated 4200 bags of sugar for delivery to its customers during the month of August, 1914, or whether said alleged purchases were made for delivery at other periods.

(e) When delivery to plaintiff's alleged customers of the sugar so alleged to have been purchased at such alleged advanced price, was actually made by plaintiff.

(f) When plaintiff obtained from its alleged customers orders for the 4800 bags of sugar mentioned in paragraph IX of the second amended complaint and whether it is intended by plaintiff to allege that orders for all of the said 4800 bags were taken by the plaintiff during the months of July and August, 1914.

(g) What quantities of sugar plaintiff actually purchased at the advanced price alleged in said second amended complaint during the months of July and August, 1914, for delivery during said month of August.

(h) Whether it is intended by the allegations of paragraph IX of said second amended complaint to allege that for many years prior to the making of said alleged contract set out in paragraph III of the complaint, plaintiff had actually sold and delivered or sold or delivered to its customers during the month of August of each year, in excess of 4800 bags of sugar;

(i) From what particular customers the plaintiff received orders for the 4800 bags of sugar mentioned in paragraph IX of the second amended complaint.

(j) How or in what manner plaintiff was "compelled" to buy in the open market the sugar mentioned in paragraph XI of said second amended complaint;

(k) When plaintiff purchased in the open market the 4200 bags of sugar which in paragraph XI of the second amended complaint are alleged to have been purchased by plaintiff for delivery to its customers.

(l) Whether it is intended to allege in said second amended complaint that plaintiff bought in the open market at the advanced price mentioned in paragraph XI of said complaint the 4200 bags of sugar mentioned therein to fill orders alleged to have been taken by plaintiff in July and August, 1914, or whether it is intended to allege that said alleged orders for said 4200 bags of sugar were in fact filled by plaintiff by deliveries either during the month of August or at any other time.

III.

That said second amended complaint is ambiguous for the same reasons and upon the same grounds hereinbefore alleged for its uncertainty.

IV.

That said second amended complaint is unintelligible for the same reasons and upon the same grounds hereinbefore alleged for its uncertainty.

GRAY, BARKER & BOWEN,
By Donald Barker,
Attorneys for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

DONALD BARKER,
Of Counsel for Defendant.

[Endorsed]: Original. No. 355. United States District Court, Southern District of California, Southern Division. T. W. Jenkins & Company, complainant, vs. Anaheim Sugar Company, defendant. Demurrer to second amended complaint. Due service of the within demurrer to second amended complaint is hereby admitted this 13th day of March, 1916. Allen & Weyl, attorneys for plaintiff. Filed Mar. 13, 1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Gray, Barker & Bowen, suite 1029 Title Insurance Building, Fifth and Spring streets, Los Angeles, California. Telephones: Home 10601, Sunset Main 685. Solicitors for defendant.

Copy Order Sustaining Demurrer to Second Amended Complaint.

At a stated term, to wit: the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room

thereof, in the city of Los Angeles, on Monday, the 6th day of November, in the year of our Lord one thousand nine hundred and sixteen:

Present:

The Honorable Benjamin F. Bledsoe, district judge.

No. 355 Civil, S. D.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

This cause having heretofore been submitted to the court for its consideration and decision on defendant's demurrer to plaintiff's second amended complaint; the court, having duly considered the same and being fully advised in the premises, now hands down an opinion herein, and it is ordered that defendant's said demurrer to the second amended complaint herein be, and the same hereby is sustained, with leave to plaintiff to amend said second amended complaint within ten (10) days, if it shall be so advised.

[Endorsed]: No. 355 Civil. United States District Court, Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs Anaheim Sugar Company, a corporation, defendant. Copy order sustaining demurrer to second amended complaint. Filed Apr. 24, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 355 Civil.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Notice of Refusal to Amend.

To the Defendant Above Named, and to Messrs. Gray, Barker & Bowen, Its Attorneys:

You will please take notice that the plaintiff in the above entitled action declines to amend its amended complaint as on file in the above entitled action.

ALLEN & WEYL,
Attorneys for Plaintiff.

Dated Feb. 15, 1917.

[Endorsed]: Original. No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Notice of refusal to amend. Received copy of the within Feb. 15, 1917. Donald Barker, by J. E. K. Filed Feb. 16, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 355 Civil.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Judgment.

It appearing to the court that an order was heretofore, on the 6th day of November, 1916, duly given, made and entered herein sustaining the demurrer of the defendant to plaintiff's complaint, and that no application was made to amend said complaint and no amendment of said complaint has been made, and it appearing to the court that said complaint and said action should be dismissed, and the court having on this 23rd day of April, 1917, on motion of Donald Barker, Esq., of counsel for defendant, ordered that said action be dismissed;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that said action be, and the same is hereby dismissed and that said defendant do have and recover of and from said plaintiff their said, defendant's, costs taxed herein at $14.00. Judgment entered April 23rd, 1917.

WM. M. VAN DYKE,
Clerk.

By T. F. Green,
Deputy Clerk.

[Endorsed]: No. 355 Civil. United States District Court, Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Copy of judgment. Filed Apr. 24, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Order of Allowance of Writ of Error.

Upon the rendering of the judgment and decree herein in the above entitled cause on this date dismissing plaintiff's second amended complaint, and plaintiff and defendant being represented in court by their respective counsel, T. W. Jenkins & Company, a corporation, by Messrs. Carroll Allen and Bertin A. Weyl, its attorneys, gave notice in open court of its application for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and decree of this court, and at the same time did file its assignment of errors, and it appearing that its application should be granted and that a transcript of the record, proceedings and papers, upon which the judgment of the court was rendered, properly certified, should be sent to the Circuit Court of Appeals of the

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 355 Civil.

T. W. JENKINS & CO., a Corporation,

Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,

Defendant.

Opinion on Demurrer.

Carroll Allen and Bertin A. Weyl, attorneys for plaintiff.

Gray, Barker & Bowen, attorneys for defendant.

Bledsoe, district judge.

This is a suit for damages in the sum of $13,020 alleged to be due plaintiff because of defendant's breach of contract.

The complaint shows that plaintiff in June, 1914, the time of the execution of the contract, was engaged in the wholesale grocery business in the state of Oregon, and that, in the carrying on of said business, it had many thousands of customers to whom it sold goods, wares, merchandise and sugar. Apparently, from the allegations of the complaint, it had no other business than that above mentioned. It is alleged that the defendant, at all times in question, was aware of the general nature and character and mode of carrying on of the wholesale grocery business conducted by plaintiff.

Plaintiff also alleges that usually and ordinarily it required during the month of August each year, and

had so required during the month of August for many years past, sugar, in bags, for sale by it to its customers at wholesale, in excess of 4800 bags, and that defendant at the time of the execution of the contract in question was aware of the requirements of plaintiff in the behalf just referred to. Under these circumstances, on the 13th of June, 1914, plaintiff and defendant entered into an agreement in writing whereby defendant, a manufacturer of sugar, agreed to sell, and plaintiff, as a wholesale vender of groceries, agreed to buy, all of plaintiff's "August requirements" of sugar at a fixed price of $4.20 per bag. No other terms, material to this controversy, were inserted. It is then alleged in appropriate language that plaintiff's requirements during the aforesaid month of August were, and it ordered of defendant, 4800 bags of the sugar described in the agreement above referred to, but that in response to such order and demand defendant shipped and delivered to plaintiff only 600 bags of the sugar. Plaintiff then alleges that it was compelled because of such refusal and default of defendant to go into the open market and purchase 4200 bags of such sugar at a price amounting to $3.10 per bag in excess of the contract price, and it is because of such excess for the sugar so purchased that the action is maintained.

The case is before the court on demurrer, both general and special, to the second amended complaint, and I am persuaded that, in accordance with a ruling heretofore rendered by the court upon the original complaint, the general demurrer should be sustained at this time.

The claim of defendant, of course, is that the contract as entered into is not supported by sufficient consideration to give it vitality; that it is void because lacking in mutuality; that it is one-sided in its entirety, in that the defendant, under any and all circumstances, could be compelled to furnish the sugar covered by the contract, but that plaintiff could in nowise be compelled by defendant to order and accept any sugar thereunder.

After very careful consideration of the particular circumstances of the case, upon reason as well as upon authority, I am constrained to accept defendant's contention. The books are full of cases, and the most important of them have been cited herein by plaintiff, to the effect that a contract binding one party to sell, and the other party to buy, all of the "requirements" of the latter's *established business* as to a given commodity, will be enforced, and this because of the fact that the ascertainment of such requirements is possible with sufficient definiteness and certainty; the subject matter of the contract being thus rendered certain, in the face of the positive reciprocal obligations complete mutuality is secured, and a breach by either party can be the basis of relief to him who tenders or has given full performance. As a necessary element of this wholesome conclusion, however, the courts have been forced to indulge in the presumption that the parties intended that the established business of the purchaser was to be carried on, substantially as of the time of contract, and that the purchase and *use* therein of the

commodity forming the subject matter of the contract would be but an *incidental* feature of the carrying on of such established business. Thus, contracts for the purchase and sale of all the ice needed for a hotel, all the coal required for a line of steamships, all the castings required for a certain manufactured product, have been upheld and enforced. It will be observed that the principle involved, and which is reflected in all of the cases, with the exception of but one or two to which attention will be directed, has to do with a purchase by, and a sale for the use of, an established business, in which, presumably, as above adverted to, the use of the commodity purchased is but an *incident* to the carrying on of the business itself, and because of which fact, therefore, the presumption can be indulged in that the business will be carried on and the incidental use of the commodity will continue, substantially as intended by the parties, entirely irrespective of any rise or fall in the price of the commodity itself.

At the very threshold of the present case, however, we are met by the fact that the business of plaintiff is not that of manufacturing, or of similar import in which its use of sugar would form but an incident of its general business, but it is that alone of *selling* sugar and other articles at wholesale. It buys such sugar, presumably, only as it can sell at a profit at current market prices, and it refrains from buying sugar which, because of a fall in price, it will be unable to sell except at a loss to itself. Here, the presumption which is in-

dulged in and is referred to in many of the cases cited, has no application or play, because of the fact that the purchase and use of the commodity in question becomes, under such circumstances, not an incident to the main business of the purchaser, but the main business itself. Any fluctuation in the price of the commodity, especially if of generous proportions as in the case at bar, inevitably affects the use of the commodity by the purchaser, and tends to negative the presumption that the business will continue substantially as intended by the parties. In this view of the case, the supposed "requirements" of the plaintiff in its wholesale business, are not the requirements of an established manufacturing or similar business, as the phrase is used in the reported cases. Presumably, plaintiff, during a given period, will "require" in its business just the amount of sugar it can sell. It will sell the amount of sugar it can dispose of at a profit; the greater the profit the more it will dispose of; if it can dispose of none at a profit, it will require none.

The situation can be stated concretely in a few words; plaintiff had contracted for all the sugar it would "require," meaning, of course, in its particular business, all it could sell, at the fixed price of $4.20 per bag. Before the contract became operative the price of sugar in the market rose to $7.30 per bag. It needs no argument to show, that with an unlimited supply—its "requirements"—at $4.20, there would be brought into play no particular effort or business sagacity on the part of plaintiff to effect sales at a

handsome profit with the general market price firm at $7.30. To presume that it would not so conduct itself, is to go counter to human experience. On the contrary, if the market price had fallen considerably, plaintiff would have refused to sell save at a profit on its own purchase price, in which event none would have been so foolish as to buy, or it would have instructed its solicitors that it had no sugar at all to sell. In either event, its "requirements" would have been the same, to-wit: practically *nil.* It would have bought no sugar from third persons and would, therefore, have committed no breach of its engagement with defendant. To presume otherwise would be to disregard the most obvious motives of self-interest.

The exact position of the parties and the consequent invalidity of the contract relied upon is portrayed with such clearness and cogency in the decision of the Circuit Court of Appeals for the 7th circuit in Crane v. Crane, 105 Fed. 869, that further comment upon it herein would seem to be a work of mere supererogation. Speaking of a similar contract which was held invalid Judge Grosscup said:

"Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple —middlemen between the defendant in error, and such customers as usually come to a merchant. Should the contract under discussion be upheld, the plaintiffs in

error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also, the *quantum* of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued.

"On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the *quantum* of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—in a situation to either go on, or to discontinue, as such interest develops.

The cases relied upon by plaintiff are Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77, 11 L. R. A. N. S. 713; Manhattan Oil Co. v. Richardson Lubricating Co., 113 Fed. 923; Marx v. American Malting Co., 169 Fed. 582; Golden Cycle Mining Co. v. Rapson Coal Mining Co., 188 Fed. 179; A. Klipstein & Co. v. Allen, 123 Fed. 992; Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co., 162 Fed. 848. These, and other cases based upon similar states of fact, which have been examined,

though not cited by plaintiff in its brief, announce the doctrine adverted to hereinabove, and with which this court is in entire harmony, that an agreement to buy and sell the "requirements" of an established business, in which the use of the thing "required" is but incidental to the carrying on of the business itself, is valid and will be upheld. It is also true, as contended by plaintiff, that the courts have departed from their earlier holdings (e. g., Bailey v. Austrien, 19 Minn. 535) and that the well established tendency now is to hold contracts for the purchase of an article "required" or "needed" or "wanted" for such an established business to be valid. If the amount of the commodity to be purchased under the contract is determinable by the mere "wish," "desire" or caprice of the purchaser, the courts are still unyielding in their disapproval. (Kirk Soap Case, 68 Fed. 791.)

No court, however, in so far as I have been able to ascertain, with the exception of the two cases now to be mentioned, has held that a contract for purchase, not for use in an established business, but for sale only, under circumstances similar to the case at bar, is valid. The Supreme Court of Illinois in Minnesota Lumber Co. v. Whitebreast Coal Co., 168 Ill. 385, 44 N. E. 774, 31 L. R. A. 529, did hold that a contract for the purchase and sale of the "requirements" of defendant coal company "engaged in the purchase, *use* and sale of coal in its business" was valid. Aside from the fact that the purchaser in that case not only expected to sell coal, but to use it as well, the point considered herein

and determined adversely to plaintiff's contention in Crane v. Crane, *supra,* was not made or considered therein. In addition, the conclusion of the court with respect to this branch of the case is based entirely upon the cases of the National Furnace Co. v. Keystone Manufacturing Co., 110 Ill. 427, and Smith v. Morse, 20 La. Ann. 220, both of which had to do with circumstances similar to those in the cases cited by plaintiff and in which the requirements were for an established business other than that of the sale of the precise commodity in question. The same situation existed in Hickey v. O'Brien, 123 Mich. 611, 49 L. R. A. 594. The only authority therein cited in support of the conclusion reached was the National Furnace Company case, which was not applicable under the circumstances shown. The conclusion of the Circuit Court of Appeals of the Seventh Circuit in the Crane case, hereinabove referred to, finds support, in my judgment, in A. S. Santaella Co. v. Otto F. Lange & Co., 155 Fed. 719; Coal Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, and Higbie v. Rust, 71 N. W. 1010.

I have not overlooked the point made that a sufficient consideration—"detriment to the promisee"—existed, in that plaintiff obligated itself to buy none of its "August requirements" from any person other than defendant. Obviously, however, if its obligation had been to buy not what it "required" but what it merely "desired" from defendant alone, during August, the same sort of consideration—an agreement not to pur-

chase from anyone else—would have subsisted. Notwithstanding this, under the principles referred to in all the cases, even those relied upon by plaintiff, the contract would have lacked validity, not from a want of consideration but, as herein, from a lack of mutuality.

The demurrer will be sustained.

[Endorsed]: No. 355 Civil. U. S. District Court, Southern District of California. T. W. Jenkins & Co., a corporation, vs. Anaheim Sugar Company, a corporation. Opinion on demurrer. Filed Nov. 6, 1916. Wm. M. Van Dyke, clerk; T. F. Green, deputy.

United States for the Ninth Circuit as prayed for in order that such proceedings may be had as may be just;

Now, therefore, it is ordered that the writ of error be allowed upon bond being furnished by the plaintiff conditioned according to law in the sum of two hundred fifty ($250.00) dollars, and that a true copy of the record, assignment of errors, and all proceedings in the case in the District Court of the United States, in and for the Southern District of California, Southern Division, shall be transmitted to the Circuit Court of the United States for the Ninth Circuit, duly certified according to law, in order that said court may inspect the same and take such action thereon as it may

chase from anyone else—would have subsisted. Notwithstanding this, under the principles referred to in all the cases, even those relied upon by plaintiff, the contract would have lacked validity, not from a want of consideration but, as herein, from a lack of mutuality.

The demurrer will be sustained.

[Endorsed]: No. 355 Civil. U. S. District Court, Southern District of California. T. W. Jenkins & Co., a corporation, vs. Anaheim Sugar Company, a corporation. Opinion on demurrer. Filed Nov. 6, 1916. Wm. M. Van Dyke, clerk; T. F. Green, deputy.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Order of Allowance of Writ of Error.

Upon the rendering of the judgment and decree herein in the above entitled cause on this date dismissing plaintiff's second amended complaint, and plaintiff and defendant being represented in court by their respective counsel, T. W. Jenkins & Company, a corporation, by Messrs. Carroll Allen and Bertin A. Weyl, its attorneys, gave notice in open court of its application for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and decree of this court, and at the same time did file its assignment of errors, and it appearing that its application should be granted and that a transcript of the record, proceedings and papers, upon which the judgment of the court was rendered, properly certified, should be sent to the Circuit Court of Appeals of the

United States for the Ninth Circuit as prayed for in order that such proceedings may be had as may be just;

Now, therefore, it is ordered that the writ of error be allowed upon bond being furnished by the plaintiff conditioned according to law in the sum of two hundred fifty ($250.00) dollars, and that a true copy of the record, assignment of errors, and all proceedings in the case in the District Court of the United States, in and for the Southern District of California, Southern Division, shall be transmitted to the Circuit Court of the United States for the Ninth Circuit, duly certified according to law, in order that said court may inspect the same and take such action thereon as it may deem proper according to law.

OSCAR A. TRIPPET,
Judge.

Dated April 23, 1917.

[Endorsed]: Original. No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Order of allowance of writ of error. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Now comes plaintiff by its attorneys in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the judgment and decree made by this honorable court on the 23rd day of April, 1917.

I.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in sustaining the demurrer of the defendant to the second amended complaint filed by plaintiff and appellant.

II.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the plaintiff's second amended complaint did not state facts sufficient to constitute a cause of action.

III.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the second amended complaint of the plaintiff was uncertain.

IV.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the second amended complaint of the plaintiff was ambiguous.

V.

That the United States District Court, in and for the Southern District of California, Southern Division, erred in holding that the second amended complaint of the plaintiff was unintelligible.

Wherefore, the appellant prays that said judgment and decree be reversed, and the said United States District Court, in and for the Southern District of California, Southern Division, be ordered to enter a judgment and decree reversing the decision of the lower court in said cause, and that said demurrer to plaintiff's second amended complaint be overruled, and for further proceedings as prayed for in said second amended complaint.

CARROLL ALLEN &
BERTIN A. WEYL,
Attorneys for Plaintiff and Appellant.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Assignment of errors. Received copy of the within assignment of errors this 23rd day of April, 1917. Donald Barker, attorney for defendant. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk; Carroll Allen, Bertin A. Weyl, 219

H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Bond.

Know All Men by These Presents:

That T. W. Jenkins & Company, a corporation, as principal, and Albert Jenkins and E. J. Hall, as sureties, of the county of Multnomah, state of Oregon, are held and firmly bound unto the Anaheim Sugar Company, a corporation, in the sum of two hundred fifty ($250.00) dollars, lawful money of the United States, to be paid to it and its successors; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 5th day of April, 1917.

Whereas, the above T. W. Jenkins & Company, a corporation, is about to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit to reverse the judgment of the District Court of the United States, in and for the Southern District of California, Southern Division, in the above entitled cause;

Now, therefore, the condition of this obligation is such that if the above named plaintiff shall prosecute its said writ of error to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

T. W. JENKINS & CO.

A. Jenkins, Pres.

(Seal) ALBERT JENKINS.

E. J. HALL.

Attest: E. B. LONDON, Secretary.

State of Oregon, County of Multnomah—ss.

On the 5th day of April, 1917, personally appeared before me Albert Jenkins and E. J. Hall, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged each for himself that they executed the same as their free act and deed for the purposes therein set forth.

And said Albert Jenkins and E. J. Hall, being respectively by me duly sworn, says each for himself and not one for the other that he is a resident and householder of the said county of Multnomah and that he is worth the sum of $250.00 over and above his just debts and legal liability and property exempt from execution.

ALBERT JENKINS.

E. J. HALL.

Subscribed and sworn to before me this 6 day of April, 1917.

(Seal) LAURA N. TAPSCOTT,

Notary Public in and for the County of Multnomah, State of Oregon.

Com. expires Oct. 20-20.

The within bond is approved both as to sufficiency and form this 23rd day of April, 1917.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: Original. No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Bond. Filed Apr. 23, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.

In the United States District Court, in and for the Southern District of California, Southern Division.

T. W. JENKINS & COMPANY, a Corporation,
Plaintiff,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Defendant.

Stipulation for Transcript of Record.

It is hereby stipulated by and between the parties to the above entitled action that the transcript to be filed in the office of the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the writ of error heretofore perfected, shall include the following pleadings and papers, on file, to-wit:

1. The second amended complaint;

2. Defendant's demurrer to said second amended complaint;

3. A copy of the minute order sustaining said defendant's demurrer to second amended complaint;

4. Plaintiff's notice of refusal to amend;

5. The judgment and decree;

6. The order allowing writ of error;

7. Assignment of errors;

8. The bond;

9. Writ of error;

10. Citation;

11. The clerk's certificate;

12. This stipulation.

The said transcript may be filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, before the 22 day of May, 1917.

Dated May 2, 1917.

CARROLL ALLEN &
BERTIN A. WEYL,
Attorneys for Plaintiff.
DONALD BARKER,
Attorneys for Defendant.

[Endorsed]: No. 355 Civil. In the United States District Court, in and for the Southern District of California, Southern Division. T. W. Jenkins & Company, a corporation, plaintiff, vs. Anaheim Sugar Company, a corporation, defendant. Stipulation for transcript of record. Filed May 2, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Carroll Allen, Bertin A. Weyl, 219 H. W. Hellman Building, cor. 4th & Spring Sts., Los Angeles, Cal., attorneys for plaintiff.